United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

74-1611

COURT OF APPEALS NO. 74-1611

In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REA EXPRESS, INC., et al.,

Petitioners,

-against-

CIVIL AERONAUTICS BOARD, et al.

Respondents.

Petition for Review of an Order

Of the Civil Aeronautics Board

BRIEF FOR AIRLINE INTERVENORS

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August 28, 1974

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BRIEF FOR AIRLINE INTERVENORS

I. PRELIMINARY STATEMENT

This brief is submitted jointly on behalf of the twenty-six scheduled certificated airlines of the United States plus Air Canada and Air France, who have intervened in this proceeding.[1/] Since the enactment of the Civil Aeronautics Act in 1938, air

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1/ Air Canada
Airlift International, Inc.
Alaska Airlines, Inc.
Allegheny Airlines, Inc.
American Airlines, Inc.
Aspen Airways, Inc.
Braniff International
Compagnie Nationale Air France
Continental Air Lines, Inc.
Delta Air Lines, Inc.
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Hughes Air West, Inc.
National Airlines, Inc.
New York Airways, Inc.
North Central Airlines, Inc.
Northwest Airlines, Inc.
Ozark Air Lines, Inc.
Pan American World Airways, Inc.
Piedmont Aviation, Inc.
San Francisco and Oakland Helicopter Airlines, Inc.
Seaboard World Airlines, Inc.
Southern Airways, Inc.
Texas International Airlines, Inc.
Trans World Airlines, Inc.
United Air Lines, Inc.
Western Air Lines, Inc.

express service has been provided in the United States pursuant to the certificates of public convenience and necessity and foreign air carrier permits issued by the Civil Aeronautics Board to these airlines. As will be more fully explained in the Counterstatement of the Case in this Brief, the participation of REA Express, Inc., (formerly Railway Express Agency, Inc., and referred to hereinafter as REA) in air express service has resulted from voluntary contracts, usually of five years duration, entered into from time to time by the airlines with REA, pursuant to which REA undertakes to perform the local pickup and delivery services for air express shipments and various administrative functions relating to air express service. All such contracts and amendments thereto have been filed with the Civil Aeronautics Board (hereinafter "Board") pursuant to the provisions of Section 412 of the Civil Aeronautics Act of 1938 and its replacement, the Federal Aviation Act of 1958 (49 U.S.C. 1382); and in accordance with the requirement of Section 412 that the Board approve or disapprove contracts and amendments so filed, the Board through the years has approved each such contract and each such amendment, including the one under which air express service is presently being provided by the airlines and REA. Without such approval, the airlines could not lawfully continue their exclusive air express arrangement with REA.

In this proceeding REA has appealed from seven Orders of the Board involving three separate and distinct proceedings:

two Orders issued in Docket 22388, the Express Service Investigation; two Orders issued in Docket 22387, the Investigation of Air Express Rates; and three Orders in Docket 26238, the Discussions Concerning Industry-Wide Priority Air Cargo Service. As will be explained in detail in the Counterstatement of the Case, the collective position of the airlines before this Court with respect to the challenged Orders in the Service Case is not the same as the position of the airlines with respect to the challenged Orders in the Rates Case or the Priority Air Cargo Case.

Throughout the Express Service Case before the Board, the airlines supported the continuation of air express service under the existing form of agreement with REA. Although events occurring subsequent to the hearing and briefing of that case before the Board have caused a change of position on the part of certain airlines with respect to a continuation of the arrangement with REA, the substantial majority of the airlines as of this time have not taken any official steps to indicate a change in their position.[2/] Thus, the airlines collectively are taking no position before this Court on the issue of whether the Board has

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2/ The Agreement between the airlines and REA has always contained a provision that any airline or REA may withdraw from such Agreement by giving six months prior written notice to the other parties (Jt.App.1393a). Pursuant to this provision, the following airlines have served the six-month notice of withdrawal from the Air Express Agreement, with the withdrawal effective on the date set opposite each of their names:

Delta	- June 14, 1974	Piedmont	- Nov. 29, 1974
Southern	- June 14, 1974	Ozark	- Dec. 26, 1974
North Central	- July 2, 1974	Continental	- Dec. 28, 1974
United	- Nov. 29, 1974	Northwest	- Dec. 31, 1974

committed legal errors in the Express Service Case which would warrant a reversal by this Court of the Board's Orders in that case. This brief on behalf of the airlines, however, will undertake with respect to the Express Service Case to present to the Court what the airlines believe to be corrections of factual errors and omissions in the REA brief concerning the contractual and operating relationships between REA and the airlines as may be appropriate to give the Court a proper understanding of the present status of the airlines in this matter.

With respect to the Rates Case and the Priority Air Cargo Case, all of the airlines fully support the Board on this appeal and contend that the Board has not committed any reversible error in those proceedings or in the decisions and orders issued therein.

II. COUNTERSTATEMENT OF ISSUES

A. Orders 73-12-36 and 74-5-25 Issued In The Express Service Investigation

The Participating Airlines do not have a collective position regarding these two Orders and are not addressing themselves to the issues with respect thereto.

B. Orders 74-5-23 and 74-5-24 Issued In The Express Rates Investigation

The Participating Airlines submit that the issues with respect to these two Orders are the following:

(1) Has the Board abused the discretion vested in it under the statute to control its own proceedings, and thereby committed

reversible error, by denying the request of REA to consolidate the Express Rates Investigation proceeding with the Domestic Air Freight Rate Investigation proceeding?

(2) Has the Board committed reversible error in investigating air express problems in two separate proceedings, one concerned with the nature, scope, and future prospects of air express service, and the other concerned with the level and structure of air express rates and the division of air express revenues between REA and the airlines, when REA at no time raised such an issue before the Board and at no time requested the Board to consolidate the two proceedings?

(3) Has the Board committed reversible error by instructing REA and the airlines to confer and attempt to resolve the retroactive divisions question, when the Board has stated that it will resolve the question if the parties cannot do so?

C. Orders 74-2-118, 74-4-1, and 74-5-74 Issued In The Discussions Concerning Industry-Wide Priority Air Cargo Service Proceeding

The Participating Airlines submit that the issues with respect to these three Orders are the following:

(1) Has the Board abused the discretion vested in it under the statute to control its own proceedings, and thereby committed reversible error, by denying the request of REA to consolidate the Discussions Concerning Industry-Wide Priority Air Cargo Service proceeding with the Express Service Investigation?

(2) Has the Board committed reversible error by permitting the airlines to conduct discussions among themselves, with only representatives of government agencies present, looking toward the establishment of an industry-wide priority air cargo service other than the present type of arrangement between the airlines and REA?

III. COUNTERSTATEMENT OF THE CASE

As pointed out above, this appeal involves orders issued by the Board in three separate and distinct proceedings. REA in its brief and for its own purposes has undertaken to interweave the procedures followed and facts developed in these three proceedings in a manner which creates both confusion and misunderstanding. Moreover, in its brief REA has asserted facts, or what are offered as facts, which the airlines believe to be incorrect; and REA has omitted facts which the airlines believe are essential for a proper understanding by the Court of this complex matter. In this Counterstatement, the airlines will undertake to correct such errors and to supply such omissions. To dispell the confusion created by REA's combining of all three proceedings into a single Statement of the Case, this Counterstatement will treat each of the three Board proceedings separately.

A. The Express Service Investigation Case

Throughout its Brief, REA persists in conveying the erroneous impression that air express is a service owned and operated and

offered to the public by REA and REA alone. Thus, at page 2 of its Brief it states that the stay granted by this Court permits "REA to continue the Air Express Service which it has successfully offered for the past forty years". And on the same page it refers to "REA's unique and vital priority air service". On page 3 it refers to "REA's Air Express service". Similar references appear throughout the REA brief.

The fact of the matter is that air express service, since the inception of Federal regulation of air transportation in 1938 has been a service of the scheduled certificated airlines performed pursuant to their certificates of public convenience and necessity. This fact was established in one of the very earliest decisions of the Board. Mid-Continent Airlines, Inc., Grandfather Certificate, 1 C.A.A. 8 (1939). REA had also applied for a grandfather certificate based upon its pre-1938 activities in connection with air express service, but its application was denied. Railway Express Agency, Grandfather Certificate, 2 C.A.B. 531 (1941). The Board did, however, grant an exemption to REA, which authorized REA to participate in contracts with the airlines for the joint rendition of an air express service. It is pursuant to such exemption that REA has participated to this day in air express service with the airlines.

At pages 22-30 of the Initial Decision of Administrative Law Judge James S. Keith in the Express Service Investigation*, the facts concerning the history, nature and growth of air express

* Jt. App. 593a-601a.

are accurately set forth.[3/] A review of those pages will provide the Court with a proper perspective for this entire appeal.

Among the salient features of that history, as recited by Judge Keith, are the following: Air express service has always been performed under voluntary agreements between the airlines and REA, usually of five years duration (subject to the right of individual termination upon six months prior written notice). From 1938 to 1959, these agreements provided that REA would be reimbursed for its services on a "cost-plus" basis (Jt. App. 594a).

In 1959, the then existing agreement had an expiration date of July 31, 1959. The airlines advised REA in the Spring of that year that they would not enter into a new agreement with a "cost-plus" provision for REA. A new agreement would have to provide (1) that REA as one party and the airlines jointly as the other party would bear their own costs and share the revenue equally, and (2) a new air express tariff would have to be filed with the Board naming each of the airlines, as well as REA, as the parties offering air express service to the public. REA strongly resisted these demands. Not until the airlines had filed their own tariff (with an August 1, 1959, effective date) for air express service to be provided without REA participation, did REA finally agree to the airlines' terms (Jt.App. 596a). Thus, commencing in August 1959

3/ REA in its Brief to the Board in the Express Service Investigation took no exception to the findings of fact by Administrative Law Judge Keith in his Initial Decision, but only to certain of his conclusions (Jt. App. 644a-645a). References to the Initial Decision of Administrative Law Judge Keith's Initial Decision will be cited as "I.D. Keith".

and continuing to this date, air express service has been provided by the airlines and REA under voluntary agreements providing for partnership-type arrangements and a joint offering of air express service to the public.

The voluntary nature of these agreements between the airlines and REA for the rendition of air express service is a matter of the utmost significance. Air express service, as it is known and utilized by shippers today, can continue only if the airlines and REA are each willing to continue their present type of voluntary arrangement. The Board is without power to force either the airlines or REA into such contractual relationship (See Jt.App. 798a).

A number of the airlines have already served notice individually of the termination of their participation in air express service with REA (See footnote 2, supra). The position of the remaining airlines, which have not served such termination notice, is also relevant on the question of the continuation of air express service.

The present Air Express Agreement between the airlines and REA (Agreement C.A.B. No. 17935 as amended) will expire, according to its terms, six months after the decision of the Board in either the Express Service Investigation or the Express Rate Investigation becomes final (including court appeals), or at the end of such shorter period as the Board's final order shall allow. Thus, even for those airlines who have not served such termination notice, the present Air Express Agreement will end, and air express

service will terminate, upon completion of either of these two cases, unless the airlines and REA voluntarily enter into a new agreement, and such new agreement is approved by the Board.

At pages 20 and 22 of its Brief, REA suggests that twenty-four airlines support a continuation of air express service. This suggestion is misleading. A review of events which have occurred since June 30, 1969, when the present Air Express Agreement was originally scheduled to expire, reveals the true situation. Those events are set forth by Judge Keith at pages 25-27* of his Initial Decision. The essential facts are as follows:

In June, 1969, at approximately the time that the 1964 Air Express Agreement between the airlines and REA was about to expire, the trustees for the railroad owners of REA sold the railroads' interest in REA to the present owners. The new owners advised the airlines that they were not prepared to negotiate a new contract. Accordingly, the airlines and REA agreed to an extension of the existing agreement until October 31, 1969, to afford the new owners time to familiarize themselves with the situation. In October, 1969, the new owners advised the airlines that REA would not continue its participation in air express service unless the airlines would immediately extend substantial financial assistance to REA. The airlines agreed, and during the period October 1969 - March 1970 gave (not as a loan) $3,000,000 to REA. The airlines and REA held negotiating sessions in the Spring of 1970, but nothing was accomplished toward a new agreement.

* Jt. App. 596a-598a.

On April 9, 1970, REA filed with the Board a petition and complaint against the airlines, asking the Board to require the airlines (1) to enter into a permanent exclusive priority service agreement with REA; (2) to provide in such agreement that all disputes between the airlines and REA would be settled by compulsory arbitration; (3) to provide in such agreement that REA would have the exclusive right to file the tariff and set the rates for air express service independently of the airlines; and (4) to charge REA a rate for air express directly related to the airlines' rates for their airfreight service. REA also requested the Board to "reform" the terms of the 1964 Agreement between the airlines and REA (which agreement had been approved by the Board and was still in effect) by reducing the airlines' share of air express revenues under the agreement and increasing REA's share (Jt. App. 37a-38a).

The airlines answered the petition and complaint and strongly opposed REA's requests, contending that they would not voluntarily enter into an agreement containing such provisions, which in effect amounted to a complete surrender of control of their air express service to REA, and that, further, the Board had no authority to compel the airlines to enter into such an arrangement with REA and no authority to modify the terms of the then existing agreement between the airlines and REA (Jt. App. 85a-98a).

The Board dismissed the petition and complaint of REA and

on July 23, 1970, simultaneously instituted two proceedings, the Express Service Investigation and the Express Rates Investigation. Upon an appeal to this Court by REA (No. 35474), the Board reinstated that portion of the petition and complaint which requested the Board to consider whether it could or should revise retroactively to April 9, 1970, the compensation provisions of the Agreement and consolidated that issue with the Express Rates Investigation proceeding. In so doing, the Board stated:

> "We take no position here on the need for such relief or on the Board's power to grant such relief in the case as presently constituted. It is our intention only to preserve such legal option should we decide to exercise such under proper conditions."

The Court then dismissed the appeal as moot.

The 1964 Agreement had been extended by the parties to June 30, 1970. On June 24, 1970, the parties finally agreed to the terms of an amendment which would continue air express service, contingent upon a new tariff rate structure and a new basis for sharing air express revenues between the parties. The existing agreement was extended to July 31, 1970, and the amendment and tariff were filed with the Board. The Board, however, suspended the said rates on July 23, 1970, which had the effect of voiding the extension. The airlines offered, but REA refused to extend the Agreement beyond July 31, 1970, pending further negotiations (Jt. App. 597a). The airlines on or about July 27, 1970, prepared to embargo air express commencing August 1, 1970, because of REA's refusal to extend the Agreement and the impossibility of continuing the joint service without an agreement covering the

many complex matters involved in providing the service. Shippers filed a complaint against the proposed embargo with the Board, and they also applied to the United States District Court in the District of Columbia, where an injunction was obtained requiring the parties to continue air express service under the terms of the expiring Agreement until the Board could decide the matter of the complaint against the embargo (Jt. App. 597a). REA then consented to a short voluntary extension of the Agreement. Meanwhile, on August 24, 1970, the Airlines and REA developed a new "interim tariff" which met the Board's objections to the suspended tariff and which would be effective while the suspended tariff was under investigation. A two-year extension of the Agreement was contingent upon Board approval of the interim tariff. On September 18, 1970, the Board issued an order permitting the "interim tariff" and the revised Agreement, including the extension, to become effective; and the injunction was dissolved (Jt. App. 598a). That Agreement is still in effect, having been indefinitely extended by the airlines and REA on December 15, 1972, to continue until six months after the date of final disposition of either the Express Service Investigation or the Express Rates Investigation (Jt. App. 1416a).

Throughout these Investigations, REA's position before the Board did not deviate substantially from the four demands listed above as set forth in REA's petition and complaint, in which demands the airlines refused to acquiesce, although various compromises were suggested by the airlines. On May 25, 1972, the Initial Decision

of Judge Keith was issued in the Service Investigation Case, in which he recommended a continuation of air express service by the airlines and REA under the present form of agreement - the position urged by the airlines, but unacceptable to REA. On May 1, 1972, the Initial Decision of Administrative Law Judge Shapiro in the Express Rates Investigation was issued, in which he found that the airlines, rather than REA, had been grossly undercompensated for air express services performed since April 9, 1970. REA filed briefs with the Board opposing these Initial Decisions. The airlines supported both Initial Decisions.

No significant changes occurred in the agreement between the airlines and REA, as amended in June, 1970, until the end of November, 1973, at which time REA advised the airlines that it was unable to pay the airlines their share of air express receipts for the month of October, 1973, which share amounted to approximately $3,500,000, and that REA would also be unable to pay the airlines their share of the November, 1973, air express receipts - another $3,500,000. The airlines met with REA on December 4, 1973, at which time REA explained to the airlines its desperate financial condition. The airlines then agreed to the following financial arrangement: REA would pay the airlines in advance each week commencing December 31, 1973, their anticipated share of air express revenues to be earned during that week - approximately $800,000; REA would pay the airlines each month commencing January 28, 1974, $583,000 plus interest on the October and November defaulted payments; and the airlines would defer until January, 1975, the $3,500,000 due them

as their share of the December, 1973, air express revenues. This arrangement was executed as an amendment to the Air Express Agreement and filed with, and approved by the Board.[4/]

On December 7, 1973, three days after the above-described financial arrangement was agreed to, the Board issued its decision in the Express Service Investigation, in which its approval of the Air Express Agreement (Agreement C.A.B. No. 17935) was withdrawn effective June 5, 1974. On January 2, 1974, REA petitioned for reconsideration of this Order. The airlines did not petition for reconsideration and opposed the type of relief requested by REA in its petition. On March 26, 1974, REA filed with the Board a motion for a postponement of the termination date from June 5, 1974, to January 31, 1975. Twenty-four of the twenty-eight airlines filed with the Board a concurrence in this Motion, stating:

"This concurrence is submitted for the following reasons:

"(a) Such extension will facilitate recovery by the airlines of the substantial debt due from REA Express to the airlines, which debt is being repaid by REA Express to the airlines in accordance with the deferred payment schedule set forth in the Amendment to Agreement CAB No. 17935 filed with the Board on January 25, 1974.

"(b) Such extension will enable the airlines to explore with REA Express the possibility of revising Agreement CAB No. 17935, looking toward a continuation of Air Express Service."

4/Board Order 74-6-23. This amendment also provides that if REA should default in any payment required under this arrangement (weekly advance payment, principal payment, or interest payment), the airlines' obligation under the Agreement to provide air express service shall terminate forthwith and the entire debt shall immediately become due and payable. (See p. 3 of Board Order 74-6-118).

Thus, the airlines' support of REA's request for an extension of air express service to January 31, 1975, was principally to afford the airlines the opportunity to recover the balance of the debt due from REA. As of June 5, 1974, (the termination date under the Board's Order), the remaining balance of the October and November, 1973, debt would have been approximately $4,000,000 and the deferred December, 1973, debt was an additional $3,500,000. Thus, the airlines would have faced losing $7,500,000 if air express service ceased on June 5, 1974. Twenty-four of the twenty-eight airlines at that time were also willing to explore with REA the possibility of developing an acceptable agreement for continuation of air express service, subject to Board approval, notwithstanding the strong position taken by the Board in its decision against the continuation of air express service under the present type of exclusive arrangement between REA and the airlines. Subsequently, however, four of those twenty-four airlines have also served their notice of termination of their participation in air express service.

The Board denied REA's petition for reconsideration. It did grant the motion for extension of the termination date, but only to July 31, 1974. The stay issued by this Court has resulted in a continuation of air express service beyond that date.

As of this date, the twenty airlines, who have not served a notice of termination of their participation in air express service, have not developed a revised agreement with REA under which air

express service would continue (subject, of course, to Board approval) beyond the termination date now designated as six months after a finally effective decision of the Board in either the Express Service Investigation or the Express Rates Investigation.

B. The Express Rates Investigation Case

In the preceding section of this Brief, the events leading up to the institution by the Board on July 23, 1970, of the Express Rates Investigation case have been described. The following recitation refers to matters occurring in that proceeding subsequent to July 23, 1970.

This case involves a general investigation of the air express rate level and structure and the agreement for divisions of air express revenues as between the airlines and REA after April 9, 1970. The air express tariff filed by the parties on June 24, 1970, and suspended by the Board on July 23, 1970, as well as the "interim tariff" filed by the parties on August 24, 1970, and permitted to become effective by the Board, were both made subject to investigation and consolidated with the Express Rates Investigation.

A prehearing conference in the Express Rates Investigation was held on November 4, 1970. Direct and rebuttal exhibits were exchanged between the parties, involving hundreds of pages of testimony and exhibits. The hearing was held from March 23, 1971, to May 7, 1971, producing a transcript of 1,739 pages. Direct briefs were submitted to Administrative Law Judge Shapiro on July 2, 1971,

and Reply Briefs on August 6, 1971.

On December 8, 1970, the Board had issued Order 70-12-44 instituting a general investigation of freight rates designated as the Domestic Air Freight Rate Investigation, Docket 22859 (hereinafter called the Freight Rate case). The investigation was instituted three months before the exchange of direct exhibits in the Express Rates case, and four and one-half months before the hearing. In its Brief to Judge Shapiro, REA argued that the express revenue of the airlines should have the same relationship to express costs as freight rates had to freight costs, and that airline rates for both express and freight should be based on by-product rather than fully allocated costs. Although the REA Brief was filed seven months after the institution of the Freight Rate Case, REA did not urge that it was necessary to consolidate the Express Rates and the Freight Rate cases. Instead, it based its contention on the evidence it had submitted in the Express Rates case.

1. Judge Shapiro's Initial Decision

On May 1, 1972, Judge Shapiro issued his Initial Decision. He rejected REA's argument that express rates should bear the same relationship to express costs as freight rates to freight costs as "patently unreasonable." (Jt. App. 477a) He found that express rates and the divisions between REA and the airlines should be based upon joint costs computed on a fully allocated basis, plus a full return. The table below compares rates and divisions under the interim

rates approved by Order 70-9-134,* and the findings of Judge Shapiro, based on 1970 traffic:[5/]

	At Interim Rates	Judge's Findings	Difference Dollars	Difference Percent
REA Share	$67,955,000	$56,672,000	$11,283,000	20% Overpayment
Airlines' Share	$41,554,000	$54,061,000	$12,507,000	23% Underpayment
Total	$109,509,000	$110,733,000	$ 1,122,000	

Thus, the Judge found that, contrary to REA's contentions here, it has not been underpaid; it was overpaid--by $11.3 million a year. Likewise contrary to REA's contention, the airlines have been underpaid--by $12.5 million a year.

Judge Shapiro also dealt specifically with REA's contention that it was entitled to a retroactive adjustment of the divisions. He stated as follows:

> ". . . REA now argues that the Board not only has the power to prescribe divisions but also that it has the power to do so retroactively to April 9, 1970, and should. It claims an overpayment to the airlines on the premise of its air freight revenue-cost formula, and, therefore, that, according to by-product costing, the airlines should return to REA over $16 million for the period April 9, 1970, to January 31, 1971, and an additional $15 million covering the period from February 1, 1971, to December 31, 1971.
>
> "However, the rates and divisions found reasonable herein indicate there has been no overpayment to the airlines; on the contrary, they show that the airlines have been underpaid. But the airlines have made no claim for retroactive payment or alteration of the divisions because, in their view, neither Section 412 nor Section 1002(h) grants authority to make retroactive adjustments. Under all the circumstances, no retroactive adjustment of the divisions is required.

5/ (Jt. App. 497a, 499a).

* Jt. App. 262a.

"In view of the foregoing, it is found that the evidence does not support REA's contention that it is entitled to reimbursement for overpayments to the airlines under the divisions from April 9, 1970, forward", (Jt. App. 483a-484a).

2. REA's First Motion To Consolidate

It was not until REA had received an unfavorable decision from Judge Shapiro in the Express Rates case that REA filed a motion requesting that the Express Rates case be consolidated for decision with the Freight Rate case. This motion was filed on May 25, 1972, almost 18 months after the Board order instituting the Freight Rate case, and over five months after the prehearing conference in that investigation. * By Order 72-7-15, the Board denied the REA motion. It found that consolidation would unduly delay the Express Rates case, that evidence in the Express Rates case itself was sufficient for an independent determination of express rates, that acceptance of REA's position would require that all rates for all classes of traffic be tried in one proceeding and would result in "intolerable delays," and that REA's motion "comes entirely too late in the proceeding since the problem now raised by REA has been inherent since the institution of the Freight Rate case on December 8, 1970." 6/

6/ On May 15, 1972, the Air Freight Forwarders Association filed a motion to stay the Examiner's Initial Decision and defer all further procedural steps in the Express Rates case, pending final decision in the Express Service case, on the ground that if the Service case were decided adversely to REA, the Rates case would become moot. REA filed a telegram in support of this motion. This is contrary to its position here that the Express Rates case should be decided before the Express Service case. Order 72-7-15* also denied the motion of AFFA. The Board held that if the decision in the Service case "results in a continuation of the present express system, deferral of the instant proceeding will have resulted in the continuation of air express rates and revenue divisions which according to the Examiner's Initial Decision are unlawful."

* Jt. App. 647a.

This order had not been appealed by REA.

3. The Increase in REA's Division During The Pendency of the Rates Case

Under the Agreement between REA and the airlines, either party may initiate a rate increase without the consent of the other party, and may require the tariffs "to be increased in an amount sufficient to provide additional gross revenue equal to the increases costs" (Jt.App.1388a). Pursuant to this provision, between 1970 and June 30, 1974, REA filed seven requests for increases in their share of the express revenues. The airlines filed one increase.[7/]

As a result of these filings, REA's air express revenue has not, during the pendency of the Express Rates case, been frozen at the level authorized by Order 70-9-98.* The Board has permitted REA to publish a series of rate increases in which the entire increase is paid to REA. These increases are summarized in the table below:[8/]

November 1971	- $1.00	per shipment across the board
February 1973	- $ .75	per shipment across the board
May 1973	- $1.00	on all shipments over 4 lbs.
December 1973	- 1.94%	on all shipments over 1 lb.
January 1974	- 5.00%	on all shipments over 1 lb.
March 1974	- 5.00%	per shipment across the board
June 1974	- 10.00%	per shipment across the board

These increases have been substantial. The table below shows the revenue to REA and the airlines for the average shipment in 1970 and the effect of the subsequent increases in rates permitted by

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7/ In December, 1973, the airlines were permitted to file tariffs providing for a 8% increase which accrued to airline revenues on all shipments over one pound.

8/ Official Air Express Tariff No. 1, C.A.B. No. 1.

* Jt. App. 254a.

the Board upon a shipment of the same weight going the same distance in each of the years after 1970:

	REA Share	Airlines Share	Total
December 31, 1970	$ 7.30	$ 4.18	$11.48
December 31, 1971	8.30	4.18	12.48
December 31, 1972	8.30	4.18	12.48
December 31, 1973	10.33	4.60	14.93
June 30, 1974	13.51	4.60	18.11

REA's revenue from an average express shipment has increased $6.21 or 85%. This increase has been authorized despite the fact that the Administrative Law Judge found that in 1970 REA had been overpaid in relation to its fully allocated costs.

4. The Board Decision in the Rates Case

On May 6, 1974, the Board issued the first of two orders in the Express Rates case which REA has appealed to this Court. In Order 74-5-23* the Board held that, in light of the decision in the Express Service case changing REA's mode of operation to an airfreight forwarder, "no useful purpose would be served by . . . attempting to resolve the disagreement between REA and the direct air carriers concerning the amounts to be paid over to the latter from revenues to be received under lawful prospective rates for express." (pp. 1-2).

The Board then addressed itself to the redistribution of air express proceeds between the REA and the airlines on a retrospective basis. It held that "the existing record does not appear to contain sufficient factual information" to determine whether the revenue divisions were equitable and that this was "especially true as far as REA's financial results and operating statistics were concerned." It held as follows:

* Jt. App. 774a.

(1) That "REA does not report on a recurrent (or even sporadic) basis any detail for its air express revenues, expenses and investment, nor such basic data as air express shipments, pieces and pounds separately from such information for its surface express operation. . . ." and that it apparently "also keeps its books on a system basis only."

(2) That "this deficiency was coupled with the fundamental revision of REA's system of accounts effective July 1, 1970 . . ." which renders it "extremely difficult, if not impossible" to obtain accurate 1970 data on the basis of the new system of accounts. Yet "REA was insistent that 1970 was the only feasible base period since it made two cost studies during that year which it deemed crucial to its allocation of costs," and that "because of a number of variable factors the studies could not be applied to 1969 data." The Board found that the "variables which were asserted by REA to make costing inapplicable to 1969 data would appear to make equally questionable the application of its methodology to later periods."

(3) That the evidence presented by REA "at the hearing was not of the highest quality, to say the least," that its exhibits "were revised and recast on various occasions, not only to alter findings from the studies but also to change fundamental statistics such as number of shipments, and the result is a morass of seemingly conflicting figures."

(4) That the problem of useful REA data "is greatly aggravated by the absence of basic data for traffic and revenues subsequent to the hearing in this case." Despite an order of Judge Shapiro to furnish monthly traffic reports until final decision by the Board,

"REA unilaterially discontinued submitting" the reports; and that "the continued absence of basic information needed to allocate costs would make the task impossible."

(5) That "while a preliminary review indicates at least $22 million of claimed errors respecting REA's costs are unsubstantiated,[9/] and that most, if not all, of REA's theories pertaining to the airline express costs are invalid,[10/] the Board is unwilling to undertake

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9/ The Board expressly rejected REA's claim of cost inflation of $14.5 million, holding that "the record support will not bear scrutiny, the basis of its forecast was 'too speculative,' and that there is no reason to believe that REA experienced inflation any more severe than the airlines with whom air express revenues are to be divided." It also rejected REA's claim for a $7 million return and tax allowance, finding that the claim was not "adequately supported," rejecting REA's attempt to use a constructive investment as "totally unacceptable," and denying REA's effort to "inflate investment to make up for losses incurred prior to the institution of the investigation." The Board also found that the remaining items raised by REA were "questionable."

10/ The Board expressly rejected REA's position that airline costs should be computed on a by-product rather than on the joint product method based on fully allocated costs used by Judge Shapiro. It also rejected REA's theory that the airlines' share of express revenues should have the same revenue-cost relationship as freight, claiming that if "it is true that the airlines cannot recover full costs on their freight operations (a question still to be determined in the Domestic Air Freight Rate Investigation, Docket 22859), it still does not follow that they should therefore lose money on express." The Board also rejected REA's "broadside attack on the ALF's non-capacity costs, asserting a $14.13 million error." It held that the "difficulty with REA's presentation is that it relies very heavily on an unsubstantiated judgment that the airlines' cost of handling express traffic is one-sixth that of handling freight." It found that "in many airports the airlines perform all handling functions and even where the REA does play a significant role, there are countermanding influences such as the size of express pieces and the expense of runners."

an in-depth review of REA's contention with respect to 1970 in the absence of at least more data for the remaining years which would be involved."

Faced with a record in which REA had failed to submit accurate or even usable evidence, the Board attempted to establish procedures which would fill the needed evidentiary gaps, fully protect the rights of the parties, and permit it to resolve the issue as to past divisions in a reasonably expeditious manner. It stated as follows:

> "In this posture the Board deems it appropriate to request the interested parties to meet in an informal conference, with a view to reaching agreement with respect to such matters as the detailed air express traffic and revenue data for calendar years 1971, 1972, and 1973; methods of evaluating the divisions made under the formula outstanding during the period April 1970 forward; and, if possible, an overall conclusion on the appropriate divisions for the period. REA and the airlines collectively are requested to specify the amounts they respectively received under the air express rate levels in effect, during the periods April 9 - December 31, 1970, calendar year 1971, calendar year 1972, and calendar year 1973, bearing in mind not only the several rate increases but special payments or credits and deficiencies. We are hopeful that, with a full understanding of the difficulties, the conferees will be constrained to resolve their own differences and present a stipulation to the Board. If, however, a consensus cannot be reached, then the parties are requested to file briefs with the Board. These briefs are to be addressed to (1) whether the Board has jurisdiction over retroactive adjustments of the divisions of air express revenues, (2) whether assuming jurisdiction, the Board should exercise its discretion to require such adjustments,11/ (3) whether further

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11/ In connection with this issue, the Board directed the parties to address themselves to (a) whether REA has the burden of proof to establish that the divisions under investigation are unlawful and (b) assuming that the answer to the foregoing is in the affirmative, whether the investigation should be terminated without further proceedings on the ground that REA has not sustained its burden.

procedures are necessary, short of final decision by the Board, and (4) what divisions should be established and the basis therefor.

Pursuant to this order, a conference was scheduled for May 28, 1974. However, on May 24, 1974, REA filed motions seeking a stay of the Board's decision in the Express Service case and the Express Rates case. Counsel for REA then requested that the May 28 schedule be canceled, stating that the meeting might not be productive in view of the pendency of an REA motion for stay filed with the Board, and his request was granted.

5. REA's Second Motion to Consolidate

On May 6, 1974, the Board issued Order 74-5-24,* which is the second order relating to the Express Rates case which has been appealed to this Court. This order denied the second motion filed by REA requesting the consolidation of the Express Rates case with the Domestic Air Freight Rate Investigation.[12/]

The Board found that, because "express rates charged to the public, as well as the issue of the prospective divisions of such rates, had for all practical purposes been rendered moot by the Board's decision to terminate REA's air express authority", the "only issue remaining in the Express Rates case is that related to the possible determination of retroactive divisions for the period beginning April 9, 1970." It held that the procedure established

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12/ As previously discussed, REA filed a motion to consolidate in May, 1972, which was denied July 6, 1972, by Order 72-7-15.** REA has not appealed this order to the Court.

* Jt. App. 783a.
** Jt. App. 647a.

in that case to deal with the problem of retroactive divisions "is clearly to be preferred to consolidation of the issue of retroactive divisions into the Freight Rate case," stating as follows:

> ". . . Consolidation would substantially broaden the scope of that already extremely complex proceeding which is concerned with the level and structure of air freight rates, and looks solely toward the making of determinations by the Board for future applicability only. On the other hand, the issue of divisions affects, for all practical purposes, only the past period, and moreover, does not directly involve the issue of freight rates. It is difficult to perceive how consolidation of the divisions question would do more than complicate and delay the resolution of the issues in both proceedings."

6. The Board Order Denying A Stay

On June 26, 1974, the Board issued Order 74-6-117* denying REA's Motion for Stay of the Express Rates case. The Board found that the Motion did not "articulate the reasons why a stay is warranted, and we are unable to find that a stay is appropriate." The Board pointed out that its order was based on two distinct findings: (1) that the issue of lawful future rates is moot, as a result of the decision to terminate REA's monopoly, and (2) that the existing record is inadequate for determination of the issue of retroactive divisions. It concluded that "REA's motion completely fails to support any claim that either of these two findings will result in any irreparable injury to REA." Moreover, it held that "the findings on the state of the record with respect to retroactive divisions do not constitute a final order of the Board on this issue and, therefore, are not ripe for judicial review." (Order 74-6-117).*

* Jt. App. 873a.

C. Discussions Concerning Industry-Wide Priority Air Cargo Service - C.A.B. Docket 26238

REA has included in its appeal three Orders of the Board issued in the proceeding entitled Discussions Concerning Industry-Wide Priority Air Cargo Service. In its Statement of the Case REA has comingled the facts of this proceeding with those in the Express Service Case in a manner which produces utter confusion. Actually, the two cases are entirely separate and distinct.

At pages 38 and 39 of the Board's Opinion in the original Express Service Investigation decision (Order 73-12-36)*, issued December 7, 1973, the Board stated:

> ". . . as part of the airlines' duty to provide reasonable transportation, they are under an obligation to offer highly expedited priority service under tariffs so providing . . . Some inter-airline coordination will be necessary, however, and accordingly, we will be receptive to requests for inter-carrier discussions about this matter."

In accordance with this clear instruction from the Board, the twenty-eight airlines listed in footnote 1 supra jointly petitioned the Board for authority to meet and discuss the creation of an industry-wide priority air cargo service. The purpose of obtaining such authority from the Board is to avoid any suggestion that the antitrust laws may be violated as a result of subsequent actions taken individually by the airlines relating to the matters discussed.

By Order 74-2-118** dated February 27, 1974, the Board authorized such discussions and set down a number of conditions, including the condition that ". . . Representatives of the Board, any other

* Jt. App. 663a.
** Jt. App. 744a.

interested person shall be permitted to attend each of these discussion meetings as observers. . . . ." The conditions also required the airlines to provide all interested parties with (a) notice of each meeting, (b) an agenda of each meeting, (c) an opportunity for all interested parties to present their views at the meetings to the airlines, and (d) complete and detailed minutes of discussions among the participating airlines.

On March 6, 1974, the airlines filed a petition for reconsideration with the Board, requesting the Board to reconsider only that part of the conditions imposed which required the airlines to conduct their discussion in the presence of shippers. The airlines did not object to the other conditions, such as affording the shippers the opportunity to present their views to the airlines prior to the airlines' discussions among themselves, nor did the airlines object to supplying the shippers with detailed minutes of the inter-airline discussions, nor did the airlines object to the presence of government officials at the inter-airline discussions.

The airlines pointed out to the Board in their petition that the presence of shippers would inhibit open and frank discussions between the airlines with regard to the handling of particular kinds of priority air cargo traffic involving such shippers. The Board recognized the validity of the airlines' request and by its Order 74-4-1* dated April 1, 1974, limited the observers who could be present during the inter-airline discussions to government officials. However, the Board added certain conditions, such as

* Jt. App. 763a.

requiring the airlines in their discussions to specifically consider the oral and written presentations made by shippers and to include in the minutes a summary of each item discussed, but without identifying the person or airline making each point. The airlines were also required to accompany any agreement reached with a detailed justification of each aspect of the agreement, including reasons for rejecting any material requests or suggestions made by shippers. Lastly, no agreement was to become effective until approved by the Board pursuant to Section 412 of the Federal Aviation Act.

Pursuant to this authorization, the airlines held their first meeting on April 18, 1974, to discuss the establishment of an industry-wide priority air cargo service. Several subsequent meetings have also been held. At all meetings shippers have presented oral and written comments, after having received from the airlines a notice and agenda of the meeting; and they have received detailed minutes of the discussions between the airlines at the meetings. Staff members of the Board have been present throughout all meetings, including the inter-airline discussions.

As a result of these meetings, the airlines have produced the draft of an "Interline Air Express Forms and Procedures Agreement" providing for the procedures to be followed by the airlines and the shipping forms and documents to be used by the airlines in handling interline priority air cargo shipments. Several of the airlines have also undertaken procedures to establish joint terminal facilities at approximately twenty-five major airports to be

operated by a third party, as agent of each such airline, for accepting, delivering, and interchanging priority air cargo on behalf of each such airline.

The present air express service provided by the airlines and REA jointly is itself a "priority" air cargo service. Thus, the priority air cargo service being discussed by the airlines in this proceeding will become meaningful only if the existing air express service is totally discontinued or if airlines individually discontinue their participation in the present air express service with REA.

Under the existing air express agreement (Agreement C.A.B. No. 17935, as amended) between the airlines and REA, air express service could immediately become terminated if REA should default in any payment required under the deferred payment arrangement now in effect, or if a receiver is appointed for REA, or if REA becomes bankrupt; and air express service also would be terminated forthwith if the Board's Order 73-12-36* is ultimately upheld by the Courts, since the Board's termination date of July 31, 1974, has already passed. If the present air express service should be totally terminated as a result of the occurrence of any one of these events, the airlines will have in readiness the procedures for establishing an industry-wide priority air cargo service as a result of these discussions.

But even apart from a total termination of the present air express service, there are airlines who have already withdrawn

* Jt. App. 663a.

from the air express agreement with REA (Delta, Southern and North Central) and those who are in the process of withdrawal (United, Piedmont, Ozark, Continental and Northwest). The Board has stated that these airlines have a responsibility to provide a priority air cargo service. Thus, the authorized discussions will facilitate the establishment of such service by these airlines in the immediate future, irrespective of the ultimate disposition of the agreement between the other airlines and REA.

REA's gratuitous deprecatory remarks concerning the airlines' proposed priority air cargo service (REA Brief, pp. 19-20) are misleading and groundless. REA implies that the airlines are incapable of creating a priority air cargo service, which could provide the commodity or geographic coverage or the expedition now provided in air express service. REA fails to state that every air express shipment today is transported from the origin airport to the destination airport by one or more of the participating airlines. Those airlines necessarily transport every type of commodity moving in air express service. There is no reason why they cannot do the same in their own priority air cargo service. Today air express moves between all 500 or more certificated airline points. The airlines' own airfreight service likewise moves between all of those same points.[13/] the geographic scope of air express service is not determined by REA. It is determined by the points named in

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13/ Jt. App. 625a.

the airlines' certificates of public convenience and necessity. Those same points would apply to the airlines' priority air cargo service.

At page 8 of its Brief, REA sets forth the three forms of air cargo services available today to shippers: (1) airline airfreight service, (2) airfreight forwarder service, and (3) air express service. In describing the airlines' airfreight service, REA at page 8 of its Brief indicates that the shipper must bring his airfreight to the airport to use this airline service; and this contention is again asserted at page 10 of the REA Brief. The fact of the matter is that the airlines provide airfreight pickup and delivery service for airfreight at every point in the United States they are certificated to serve and throughout the terminal areas surrounding those points, and such service is set forth in the airlines' tariffs on file with the Board.[14/] The airfreight pickup and delivery services of the airlines are co-extensive with the pickup and delivery services provided for air express under the air express tariff on file with the Board. Thus, there is really no question as to the capability of the airlines in providing a priority air cargo service independently of REA if and when warranted.

REA opposed the original petition of the airlines in this proceeding on the ground that it should have been filed in the Express Service Investigation, since the priority air cargo service would replace the existing air express service. In the alternative,

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14/ Jt. App. 602a.

REA requested that this proceeding be consolidated with the Express Service Investigation. The Board rejected both contentions of REA, saying that the priority air cargo service under consideration would be a new type of service and that termination of air express service was not contingent upon the existence at the time of such termination of a new priority air cargo service (Jt. App. 746a).

REA also filed a petition for reconsideration of the Board Order 74-4-1, which modified the conditions pursuant to the airlines' petition for reconsideration. In that petition it argued that the airlines' proposed priority air cargo service would not be an adequate substitute for the present air express service, that REA should have first opportunity to be the agent of the airlines in performing any ground services in connection with the proposed priority air cargo services of the airlines, and that REA should have the right to participate in the formulation of the airlines' proposed priority air cargo services to protect its property and the jobs of its employees. The Board rejected all of these contentions - the first two as being premature and the third being legally without substance (Jt. App. 814a).

IV. ARGUMENT

In the interest of clarity, separate arguments will be presented herein with respect to the validity of the Board's orders in C.A.B. Docket 22387, the Express Rates Investigation case, and the validity

of the Board's orders in C.A.B. Docket 26238, the matter entitled Discussions Concerning Industry-Wide Priority Air Cargo Service. No argument will be presented with respect to the validity of the Board's orders in C.A.B. Docket 22388, the Express Service Investigation case, because of the lack of any uniformity in the position of the airlines with respect to their intentions or desires concerning the continuation of air express service with REA.

A. THE BOARD ORDERS 74-5-23 AND 74-5-24 ISSUED IN THE EXPRESS RATES CASE ARE LEGALLY VALID

In addition to appealing the Board orders in the Express Service case, primarily on the ground of inadequate findings, REA has appealed two orders relating to the Express Rates case:

(1) Order 74-5-23*, holding that the prescription of future rates and divisions is moot because of the Board decision to eliminate express service and establishing procedures to determine whether the Board has any authority to fix retroactive divisions and, if so, the amounts of those divisions accruing to REA and the airlines; and

(2) Order 74-5-24**, denying consolidation of the Express Rates case with the Domestic Air Freight Rate Investigation.

REA urges that the Board was required to consider the Express Service and Express Rates cases in one proceeding. It also urged that the Board was required to consolidate the Express Rates case with the Freight Rate case. Finally, REA has challenged the Board order establishing further procedures, claiming that the Board "improperly evaded a decision on the divisions issue in the Rates

* Jt. App. 774a.
** Jt. App. 783a.

case which might itself have resolved REA's financial plight."

The airlines are taking no position as to whether the findings in the Service case meet the judicial and statutory criteria. They do urge, however, that there is no basis for reversal of the Board's action because of a failure to consolidate the Express Rates case with the Express Service case, or a failure to consolidate it with the Freight Rate case. Moreover, there is no error in the Board decision establishing new procedures for determining the legal and factual issues relating to divisions for the past period.

1. The Courts Have Consistently Recognized That The Board Has Broad Discretion In Controlling Its Procedures

Section 1001 of the Act provides that the Board shall conduct its proceedings "in such manner as will be conducive to the proper dispatch of business and to the ends of justice." The courts have consistently recognized that the Board has broad discretion in shaping its procedures to meet the statutory standards. The applicable principle was set forth in City of San Antonio v. C.A.B., 374 F.2d 326 (D.C. Cir. 1967). The Court upheld a Board consolidation order in the Transpacific case, limiting proposed nonstop Pacific service to 25 top mainland cities. The Court stated:

> "No principle of administrative law is more firmly established than that of agency control of its own calendar. Practical problems of calendar administration confront an agency whenever related applications are pending at the same time. Consolidation, scope of the inquiry, and similar questions are housekeeping details addressed to the discretion of the agency and due process or statutory considerations aside, are no

> concern of the courts. 'Congress plainly intended to leave the Board free to work out application procedures reasonably adapted to fair and orderly administration of its complex responsibilities.' Civil Aeronautics Board v. State Airlines, Inc., 338 U.S. 572, 576, 70 S.Ct. 379, 94 L.Ed. 353 (1950). This is precisely what Congress had in mind when, in Section 1001 of the Federal Aviation Act, it granted the Board authority to conduct its 'proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice.' 49 U.S.C. §1481." [Footnotes omitted.]

This principle is supported by pervasive authority.[15/]

2. The Board Did Not Err In Refusing To Consolidate The Express Rates and the Freight Rates Investigations

REA urges that the Board erred in failing to consolidate the Express Rates case with the Freight Rate case. It asserts that the Board was required to consider "comparative economics" as represented by the relationship between freight and express rates, and that the Board not only ignored these factors "but actually imposed a procedural bar to their consideration by declining to consolidate the Rates case with its general investigation of air cargo (and consequently air freight forwarder) rates." REA contends that the Board is required "to establish the relative and comparative structure of air express and air cargo rates before making any final determination to reduce air express service." (REA Brief, pp. 35-37).

15/ C.A.B. v. State Airlines, Inc., 338 U.S. 572 (1950); Western Air Lines, Inc. v. C.A.B., 184 F.2d 545 (C.A. 9, 1950); United Air Lines, Inc. v. C.A.B., 228 F.2d 13 (D.C. Cir. 1955); Eastern Air Lines, Inc. v. C.A.B., 271 F.2d 752 (C.A. 2, 1959), cert. denied, 362 U.S. 970 (1960); F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134 (1940).

(a) REA did not make a timely motion to consolidate the Express Rates and Freight Rates Investigations

The Board instituted the Freight Rate case on December 8, 1970 (Order 70-12-44)*. This was three months before the exchange of exhibits in the Express Rates case and four-and-a-half months before the hearing. If REA is correct as to the requirement for consolidation, it had the responsibility to file a motion at that time, when consolidation could have been granted with far less disruption than at later periods.

The only order denying consolidation which REA has appealed is Order 74-5-24. REA's motion to consolidate was filed on January 31, 1974, which was three years after the order instituting the Freight Rate case (Order 70-12-44)*. Clearly, the Board would be unable to conduct its proceedings in an orderly manner if it were required to grant motions to consolidate filed at the end--rather than the beginning--of the proceeding.

While REA has not appealed the order, the Board had considered and denied an earlier motion to consolidate filed by REA. This motion was filed on May 25, 1972, which was one-and-one-half years after the institution of the Freight Rate case, and two years after the close of the hearing in the Express Rates proceeding. Indeed, it was filed only after REA had received an unfavorable rate decision from Judge Shapiro on May 1, 1972. In dismissing REA's motion, the Board found that its argument that the cases must be consolidated "comes entirely too late in the proceeding since the problem now raised by REA has been inherent since the institution

* Jt. App. 265a.

of the Freight Rate case on December 8, 1970." (Order 72-7-15).* This finding is even more applicable to Order 74-5-24, which REA has appealed to this Court.

(b) The Board orders denying consolidation were based on findings which clearly support its determination

Order 74-5-24 dismissed REA's motion of January 31, 1974, to consolidate the Express Rates and Freight Rate cases. The Board pointed out that in the simultaneously issued order, in the Express Rates case, the issue of future rates has "for all practical purposes been rendered moot by the Board's decision to terminate REA's air express authority," and that the "only issue remaining in the Express Rates case is that related to the possible determination of retroactive divisions for the period beginning April 9, 1970." The Board then held as follows:

> ". . . Consolidation would substantially broaden the scope of that already extremely complex proceeding which is concerned with the level and structure of air freight rates, and looks solely toward the making of determinations by the Board for future applicability only. On the other hand, the issue of divisions affects, for all practical purposes, only the past period, and moreover, does not directly involve the issue of freight rates. It is difficult to perceive how consolidation of the divisions question would do more than complicate and delay the resolution of the issues in both proceedings."

The Board order is clearly within its discretion and supported by adequate findings.

While REA has not appealed Order 72-7-15*, denying REA's motion of May 25, 1972, the Board's findings in that order clearly demonstrate the unsoundness of REA's position here that the Express Rates

* Jt. App. 647a.

case should be consolidated with the Freight Rate case. As previously discussed, the Board found that since the motion had been filed 2-1/2 years after the institution of the Freight Rate case, it was untimely. However, it also made other findings as follows:

(1) It found that the grant of REA's motion would "unduly delay this proceeding" since hearing in the Freight Rate case will not begin until 1973.[16/]

(2) It found that, although some of the evidence in the Freight Rate case might be relevant to the issues in the Express Rates case, "it does not follow that the appropriate rates and revenue divisions for express traffic cannot be determined from the record in the instant proceeding." It found that it could not accept "REA's argument that its interests and those of its customers would be prejudiced by separate determinations of express and freight rates." REA's "contention as to prejudice is based upon the Examiner's finding that air express should bear fully allocated capacity costs where at present airfreight does not. REA is, of course, free to argue in favor of a different substantive result."

(3) It held that "although it would be desirable to avoid disparities in the treatment of various classes of traffic when determining the costs which each must bear, such temporary disparities could be avoided only by determining rates for all classes of traffic in one proceeding."

16/ Actually, hearing in the Freight Rate case did not begin until February, 1974; direct briefs to the Administrative Law Judge were submitted on July 29; and reply briefs are due on August 28. Thus, the delay is far more substantial than the Board contemplated at the time it issued Order 72-7-15.

American and other carriers appealed the order. They argued that, since the Board related the reasonableness of joint fares to the level of local fares, it was required to examine the reasonableness of local fares. The reasonableness of local fares was being decided in a separate proceeding--Phase 7. The Court rejected this argument. While recognizing the principle that "the reasonableness of a rate may turn in part on its relationship to other rates," it held as follows:

> "At issue is the Board's power to segregate its proceedings and group issues in a convenient and efficient manner. Seen this way, the question admits of only one answer. The courts have uniformly recognized the Board's authority to arrange its business and order its dockets as expedience may dictate. . . . In the present case the Board divided its labors in an eminently sensible fashion. The relationship between interline and local fares emerged naturally during the consideration in Phase 4 of all the novel questions raised by joint fares; the issue of local fare levels was sensibly consigned to Phase 7 because it involved problems far more familiar to the Board. As anticipated by the Board, the workings of the two phases meshed with each other to produce mutually consistent results. We would create a nightmarish precedent by requiring merger of Phases 4 and 7 merely because the joint fare ceiling in Phase 4 was formulated in terms of the local fare levels under study in Phase 7. Every fare in a well-articulated rate structure is related in some more or less formal fashion to every other fare. For the Board to decide all fare issues at once, in a single and ungainly proceeding, is manifestly absurd." (p. 1020)

This holding is dispositive of REA's argument here. Phase 4 fares were directly based on the Phase 7 fares--a far closer relationship than exists between express and freight rates. The Court found that requiring consolidation "would create a nightmarish precedent." It recognized, as REA argues here, that every fare is related more or less to every other fare. It held, however, that for "the

(4) It concluded that since this "would result in intolerable delays, we believe the public interest can best be served by proceeding to determine the rates for air express as expeditiously as possible."

Each of these reasons illustrates the unsoundness of REA's position here that the Board had an obligation to consolidate the two cases. Each of them demonstrates that the decision not to consolidate is clearly within the discretion of the Board and consistent with the procedural requirements of the statute and does not prejudice REA.

In American Airlines v. CAB, 495 F.2d 1010 (D.C. Cir. 1974), the Court gave consideration to an argument which is very similar to that advanced by REA in this case. In the Domestic Passenger Fare Investigation, Docket 21866, the Board had instituted a comprehensive examination of passenger fares throughout the airline industry. It divided this investigation into nine separate phases. Phase 4 dealt with joint fares charged interline passengers utilizing two or more different airlines. Phase 7 dealt with the reasonableness of overall fare levels, including local fares--the fare charged to passengers utilizing the services of only one airline. In Phase 4 the Board issued an order finding that the joint fare in Phase 4 for an interline passenger was the sum of the local fare for each separate carrier minus $4.00 per terminal connection (Order 72-4-42).

Board to decide all fare issues at once in a single and ungainly proceeding is manifestly absurd."

(c) The courts have consistently recognized that the Board has the discretion to frame its proceedings in a manner which permits the discharge of its responsibilities

The question of balancing the interests of parties in consolidation against the public interest in manageable administrative proceedings has been discussed extensively in a long series of cases dealing with the rights of air carriers to consolidate applications in route proceedings under the Ashbacker doctrine. This doctrine requires that the Board hear competing applications in the same proceeding where the grant of one application would preclude the grant of another.[17/]

Eastern Air Lines v. Civil Aeronautics Board, 243 F.2d 607 (D.C. Cir., 1957) presents a typical Ashbacker issue. In that case, Northwest applied for Detroit-Miami rights which Eastern already had, and the Board set this application for hearing. Eastern sought expansion of the proceeding to include its application for Detroit-West Coast rights already held by Northwest. It contended that this was required by Ashbacker since Northwest already had authority between the West Coast and Detroit and a grant of Northwest of Detroit-Miami authority would give it West Coast-Detroit-Miami rights. If Eastern were not then given an opportunity to attain

17/ Ashbacker Radio Corporation v. Federal Communications Commission, 326 U.S. 327 (1945).

the same transcontinental route by completing its missing segment, it could not as an economic matter justify a second carrier on that route.

The Court rejected Eastern's argument, stating as follows:

> ". . . Eastern says its new application is mutually exclusive with Northwest's Pittsburgh-Miami application, because the traffic, and so the competing service, to and from Miami is through, not merely to or from, Detroit. And in a very real sense this is true. . . . Despite Ashbacker it seems to us that the Board must have a measure of discretion in placing limits to the extent of a given proceeding. . . . An existing certificate holder cannot by the mere filing of applications for routes transform a limited inquiry into a massive consideration of the whole of American air transportation. The problem is typically one for agency judgment. If the Board is not unreasonable in its limitation of a proceeding, the courts ought not to interfere, even if they have power to do so. . . ." [underscoring in original]

Again the language is applicable here. REA has no right to "transform a limited inquiry" into a massive consideration of the whole of property rate structure. The Board has been reasonable in its limitation of the proceeding. The Court ought not to interfere.

The Court applied similar principles in dealing with an Ashbacker problem in Frontier Airlines, Inc. v. Civil Aeronautics Board, 349 F.2d 587 (C.A. 10, 1965). The Court stated:

> "Although the Board is bound by Ashbacker that principle is not boundless in its implications. The Board has a basic right to limit the scope of its inquiries. Eastern Air Lines v. Civil Aeronautics Board, 85 U.S. App. D.C. 412, 178 F.2d 726; Eastern Air Lines v. Civil Aeronautics Board, D.C. Cir., 243 F.2d 607. And practicality dictates that the existence of overlapping applications does not require the expansion of specific inquiry into a generalized study of air needs by area or types of service."

The Court held that the Board was not required "to equalize as far as possible all inherent advantages between applicants before a general investigation could go foward. The complexity of such procedure would destroy its worth and result in a hopeless administrative jumble. . . ."

These principles are directly applicable here. The Board has the discretion to control its own docket. It is not required to adopt procedures which make the administration of its responsibilities impossible by producing a "hopeless administrative jumble." It is not required to consolidate the industry-wide Express Rates case with the industry-wide Freight Rate case.

(d) Denial of consolidation of the Express Rates and Freight Rates cases did not preclude consideration of freight costs or freight rates in the Express Rates case itself

REA asserts that the Board not only ignored comparative rates "but actually imposed a procedural bar to their consideration by declining to consolidate the Rates case with its general investigation of air cargo (and consequently air freight forwarder rates)." (CAB Order No. 74-5-24, May 6, 1974, Docket Nos. 22387 and 22859).

The Board's refusal to consolidate the Express Rates and Freight Rate cases in no way posed "a procedural bar" to the comparative consideration of express rates and freight rates or costs. Indeed, the exhibits in the Express Rates case are replete with rate evidence submitted by REA, as well as the airlines, com-

paring express and freight rates, and express and freight costs.[18/]

REA's problem is not that the record in the Express Rates case lacks evidence as to freight rates and costs. Its problem is that neither the Administrative Law Judge nor the Board accepted its arguments based on the record evidence. As to freight, Judge Shapiro found that REA's contention that the airlines' share of air express should be based on the airfreight revenue-cost relationship was "patently unreasonable." He found that to base it on airfreight ton-mile yields alone, ignores the very pronounced difference in average size of shipment and length of haul of express and freight, that the "record affirms that the airline yield from freight is substantially greater than from express for shipments of comparable size and distance." (I.D., pp. 80-81) He fixed the airlines divisions for express on the fully allocated costs of the express service plus a fair return, and applied the identical principle to REA. (I.D., pp. 10, 35-38, 85-86).

18/ The record in the Express Rates case contains a comprehensive comparison of air express and airfreight rates (Jt. App. 293a-309a; 1694a-1729a). Comparisons are also made in Exhibit E of the Direct Brief of REA to the Board, and Appendix A of its Reply Brief. REA presented exhibits including comparing both capacity and noncapacity costs for express and for freight. REA's Brief to Examiner Shapiro described its capacity costs as follows: "Mr. McIntosh's exhibits REA-1000 series and REA-R-1100 series cost out separately freight, express and both priority and non-priority mail. His exhibits are designed to reach a rational result for each type of traffic and a result for all FEM combined that can be reconciled with reported overall cargo cost data." (p. 48). The Brief also produced Exhibit REA-1087A, which computed the relationship of noncapacity costs of freight and express.

In Order 72-7-15, denying REA's first motion to consolidate, the Board found that REA was not being "prejudiced by separate determination of express and freight rates." It held that "REA's contention of prejudice is based upon the Examiner's finding that air express should bear fully allocated costs whereas at present air freight does not. REA is, of course, free to argue in favor of a different substantive result."

In issuing its order in the Express Rates case, the Board expressly dealt with REA's contention as to freight rates and costs. (Jt. App. 780a). It held that the record "strongly suggests that REA's past problems with contracting shipment volumes were attributable to a reputation for poor service rather than to its prices."[19/] It then stated as follows:

> "These prices remained advantageous competitively vis-a-vis air freight in the short-haul markets where the vast bulk of REA's traffic is carried. The repeated post-hearing filings for rate increases by REA are not inconsistent with a belief that express traffic is relatively price-inelastic. Moreover, for division purposes, costs should not be altered by price elasticity considerations: divisions should be cost-based, and here the respective percentage shares of revenues are fixed in proportion to respective costs, inability to price at cost is irrelevant." [underscoring in original]

19/ The record in the Express Rates case gave the Administrative Law Judge and the Board a full opportunity to explore rate advantages and disadvantages of express, as compared to other services, on the basis of the rate charged at the time of its decision. This is the type of comparative evaluation which was involved in Schaffer Transportation Co. v. U.S., 355 U.S. 83 (1957), relied upon by REA in its criticism of the findings in the Express Service case.

Moreover, it held that REA's theory that the airlines' share of express revenues "should have the same relationship to their express costs (based on by-product 'costing') as their freight rates bear to freight costs was properly rejected by the ALJ's finding as follows:

> "If it is true that the airlines cannot recover full costs from their freight operations (a question still to be determined in the Domestic Air Freight Rate Investigation, Docket 22859), it still does not follow that they should therefore lose money on express or should therefore be awarded a lower share (assertedly $3.79 million less) of express revenues." (Jt.App.780a).

Under these circumstances, it is clear that REA has not been prejudiced by the failure to consolidate the Express Rates and Freight Rate cases. The record contains full evidence comparing the level of express and freight rates. It also contains evidence as to both express and freight costs. This evidence was not ignored by the Board. It was considered and rejected.

3. The Board Was Not Required To Consolidate The Express Rates Case With The Express Service Case

REA argues that by "shunting key rate issues off into a separate proceeding which it never decided, the Board ignores its statutory mandate to act in the 'public interest' and sidesteps any consideration of the comparative costs of air express service. . . ." It argues that "REA's Petition and Complaint which prompted institution of both the Board's Express Service and Express Rate

investigations presented the Board with an opportunity and an obligation to conduct a comprehensive examination of the economics of air express as a unique transportation concept, and to explore the various options for reforming air express service." It then asserts that the Board chose "not to go forward with an integrated investigation but immediately to bifurcate the Air Express proceedings into a Rates case and a Service case. This critical misjudgment toally disrupted the orderly presentation of the relevant issue and ultimately resulted in the Board's paradoxical holding that the future economic issues were 'moot' because the Board had already decided to end air express service without reaching or considering economic factors." (REA Brief, p. 34)

(a) REA has no standing to appeal the Board's orders establishing separate Express Service and Express Rates cases since it did not raise the issue below

There is little need to detain the Court with REA's contention that the Board erred in establishing separate investigations to consider express rates and service. This issue was never raised below by REA. When the Board issued Orders 70-7-109* and 70-7-110,** setting up separate investigations, REA filed no petition for reconsideration. While it appealed to this Court the dismissal of its complaint in Order 70-7-110 on other grounds, it did not urge that the Board had the obligation to hear the service and rates issues in the same proceeding. And while during the four years when these cases have been pending, REA has flooded the Board with procedural

* Jt. App. 174a.
** Jt. App. 181a.

motions, it has never filed a motion for consolidation of the service and rate cases. Because of this, there is, of course, no order before this Court denying a motion for consolidation.

Under these circumstances, REA has no standing to raise the issue of consolidation of the Express Rates and Express Service cases. Section 1006(e) of the Federal Aviation Act expressly provides as follows:

> ". . . No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so."

Pursuant to this provision, the courts have consistently refused to consider questions not raised before the Board.[20/] As the D. C. Circuit recently held in Air Line Pilots Association International v. CAB: "As a practical matter, we cannot exercise an appellate function in the review of administrative matters unless the problems have been fully aired and focused in the proceedings below." Case No. 73-1214, decided August 8, 1974, Slip Opinion, p. 8.

20/ New England Air Exp. v. Civil Aeronautics Bd., 194 F.2d 894 (D.C. Cir. 1952); American Overseas Airlines, Inc. v. Civil Aeronautics Bd., 254 F.2d 744 (D.C. Cir. 1958); Nebraska Dept. of Aeronautics v. C.A.B., 298 F.2d 286 (C.A. 8, 1962); Island Airlines, Inc. v. C.A.B., 363 F.2d 120 (C.A. 9, 1966); National Capital Airlines, Inc. v. C.A.B., 419 F.2d 668 (1969), C.D. 398 U.S. 908; Frontier Airlines, Inc. v. C.A.B., 439 F.2d 634 (D.C. Cir. 1971).

(b) Consolidation of the Express Rates, Express Service and Freight Rates cases in one proceeding would produce a massive, unwieldy proceeding which would frustrate the effective discharge of the Board's statutory responsibilities

Apparently REA would not be satisfied even if the Board had considered the issues of the Express Service and Express Rates cases in one proceeding. In addition, it contends that the Board is required to consolidate these cases with the Freight Rate case. Indeed, it goes so far as to assert that the Board's "failure to fix the relative rate levels of air express and competing services prevented the Board from even considering 'efficient transportation of . . . property at the lowest cost' and 'efficient services by carriers at reasonable charges' as required by the Federal Aviation Act." (REA Brief, p. 33).

REA's position goes far beyond the proposition that the Board must consider the level of express rates and freight rates in the Express Service case and the Express Rates case. It argues that the Board is required to conduct, simultaneously and in the same proceeding, a full investigation of express rates and freight rates of all the air carriers; that it must fix new express rates and freight rates on the basis of the statutory criteria of Section 1002(e); and that only after these rates have been fixed is the Board in a position to make a comparative evaluation in the Express Service case of the need for service of REA in light of future rates

for express service as compared to the rates for freight service.[21/]

The mere statement of the proposition is its best refutation. It would require that the Board convert every new service or new route proceeding into a combined route-rate proceeding, with full consideration not only of the public interest criteria of Section 102 and the certification criteria of Section 401 with respect to the new service, but also the rate criteria of Section 1002(e) of the Act. (49 U.S.C. 1302, 1371, 1482(e)) The rate criteria would be applied not only to the rates of the applicant, but to the rates of its competitors.

Such a massive broadening of the issues would interminably delay the Board in reaching decisions on either the need for additional service or the reasonableness of existing or proposed rates. It would render virtually impossible the effective discharge of both the Board's licensing and its ratemaking duties. There is no legal requirement that the Board utilize procedures which frustrate the effective discharge of its statutory responsibilities.[22/] Indeed, the Board's obligation to conduct its proceedings "in such manner as

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21/ Indeed, it is not clear that even this investigation would satisfy REA. It apparently implies that the Board has an obligation to consider air freight forwarder rates--a subject not currently under investigation (REA Brief, p. 36). Presumably the completion of this investigation would also be necessary before the Board could make the required determination.

22/ See cases cited in Part IB, supra.

will be conducive to the proper dispatch of business and to the ends of justice" would be thwarted by the massive consolidations postulated by REA's position in its brief to this Court.

4. There Is No Error in the Board Decision Establishing New Procedures for Determining the Legal and Factual Issues Relating to Divisions for the Past Period

REA takes the position that the Board improperly evaded a decision on the divisions issue in the rate case which might itself have resolved REA's financial plight.[23/] It asserts that it has been

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23/ REA misstates the procedural history of the retroactive divisions issue. It argues that the "Board initially ducked this issue and limited its rate case to future divisions issues" and that "Only after REA appealed to this Court did the Board relent and broaden the Rates case to include this critical retroactive division issue." (REA Brief, p. 50) the facts are that the Express Rates case has always included the retroactive issue back to July 23, 1970--the date of institution of the Rate Investigation. When the Board issued Order 70-7-110, instituting the Express Service Investigation, it found that the issues to be tried were broader in scope than those raised by REA's Petition and Complaint and dismissed it. REA petitioned this Court for review (No. 35474). Its brief contended for the first time that the legal effect of dismissing its Petition and Complaint was to make July 23, 1970, the date when the Rate Investigation was instituted, the earliest date on which new retroactive divisions matters could be made effective, instead of April 9, 1970, when REA's Petition and Complaint was filed. In Order 71-2-68, the Board found that this issue "had not previously been presented to, or considered by, the Board," and amended its order to permit consideration of retroactive divisions back to April 9, 1970, the date on which REA had filed its Petition and Complaint. This Court then dismissed as moot REA's petition for review.

undercompensated by as much as $50 million by its airline partners, and that if it had received recovery of this magnitude it would have been restored to financial health. It also asserts that the Board refused to decide the retroactive divisions issue and simply ordered its Bureau of Economics to convene an information conference to discuss the issue. These procedures "transgressed the statutory limitations on ex parte resolution of rate issues" and "undercut entirely any basis whatsoever for the Board's conclusions regarding REA's financial circumstances." (REA Brief, pp. 50-51).

REA's assertion that it has been undercompensated by as much as $50 million because of unreasonable divisions in the past period is a fantasy. REA has placed great emphasis in its brief on the weight which should be accorded to the decision of the Administrative Law Judge in the Express Service case (REA Brief, p. 29). It has neglected to even mention the decision of Judge Shapiro in the Express Rates case. Judge Shapiro dealt directly with its claim for an increased share. He found that, based on 1970 traffic, REA was not underpaid--but overpaid--in the amount of $11.3 million for this year alone.[24/] (Jt. App. 49a, 499a, 310a). He further found that "the rates and divisions found reasonable here indicate there has been no overpayment to the airlines. On the contrary, they show that the

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24/ The Board's Bureau of Economics made no calculations for 1970. However, for 1969, Judge Shapiro concluded that REA was entitled to $58,920,000. For the same period, the Bureau computed REA's entitlement at $52,267,000. REA actually received over $60,000,000 in 1969. (Jt. App. 497a, 310a).

airlines have been underpaid."(Jt.App.484a). He concluded that "the evidence does not support REA's contention that it is entitled to reimbursement for overpayments to the airlines under the divisions from April 9, 1970, forward." (Jt. App. 485a).

Judge Shapiro was not alone in this determination. The Board's Bureau of Economics also conducted an investigation of REA's claim and made recommendations to Judge Shapiro and to the Board. It recommended less for REA than that provided by the decision of the Administrative Law Judge (See footnote 24).

REA's claim also overlooks two other factors:

(1) It contradicts REA's claim that its losses were occasioned by surface traffic rather than air express. Thus, REA's Brief states as follows:

> "In reality, REA's recent financial woes were largely caused by losses from REA's surface transportation, where shipments have dropped from 53 million in 1966 to 15 million in 1971. (I.D. 60). These surface traffic losses have little to do with Air Express, but are instead directly attributable to increases in the size and weight of packages accepted as parcel post by the U.S. Postal Service. (pp. 47-48)."

It is hard to reconcile this statement with REA's claim that it is entitled to $50 million more in air express revenues from the share paid the airlines since April 9, 1970.

(2) It ignores the fact that during the pendency of this case REA has not been frozen at the level prescribed by Order 70-9-98*. On seven different occasions since 1970, REA has unilaterially increased air express rates in order to recover its alleged costs for providing its portion of the air express service; and, in

* Jt. App. 254a.

accordance with the provisions of the Air Express Agreement between REA and the airlines, the entire additional revenue derived from those increases in rates has been paid to REA. Thus, REA's share of air express revenue has increased from $7.30 on December 31, 1970, for the average air express shipment in 1970, to $13.51 on June 30, 1974, for a shipment of the same weight going the same distance - an increase of 85% or $6.21 per shipment. During the same period, the airlines' share of revenue from the same shipment increased only 10%, from $4.18 to $4.60, or 42¢.

REA received these increases despite Judge Shapiro's determination that at 1970 levels REA had been overpaid in the amount of $11.3 million. Clearly, REA's claim that it might be entitled to recover retroactively as much as $50 million from the airlines is frivolous. Actually, it is entitled to nothing either legally or factually.

Finally, the Board order establishing further procedures for the determination of retroactive divisions is soundly based (Order 74-5-23). The findings make it clear that the Board could not reach a conclusion on the facts, because REA itself failed to provide adequate evidence. It failed to provide separate allocations between the air express and surface express business. It changed its accounting system in the middle of 1970 in a manner which rendered the evidence which it had submitted useless for 1969, for 1970, and for subsequent periods. Nor did it comply with the order of Judge Shapiro to submit monthly traffic reports until final

decision of the Board, but "unilaterally discontinued submitting the reports." And, as the Board found, the evidence presented by REA at the hearing "was not of the highest quality to say the least. The exhibits were revised and recast on various occasions, not only to alter findings from the studies but also to change fundamental statistics such as a number of shipments. . . ." It was for this reason that the Board found that the "result is a morass of seemingly conflicting figures."

Faced with an impossible record occasioned by deficiencies in evidence submitted by REA itself, the Board established an informal conference procedure in an effort to obtain agreement as to basic data for the past period, and, if possible, a reconciliation of the differences between REA and the airlines, with a stipulation to the Board. It did not, as REA asserts, adopt procedures designed to provide an "ex parte resolution of rates issued." Instead, it provided that if the parties could not reach agreement, briefs were to be filed with the Board, addressed to the following issues:

> "(1) Whether the Board has jurisdiction over retroactive adjustments of the divisions of air express revenues, (2) whether assuming jurisdiction, the Board should exercise its discretion to require such adjustments, (3) whether further procedures are necessary, short of final decision by the Board, and (4) what divisions should be established and the basis therefor."

Moreover, in dealing with the second issue, parties are also to address themselves to "(a) whether REA has the burden of proof

to establish that the divisions under investigation are unlawful and (b) assuming that the answer to the foregoing is in the affirmative, whether the investigation should be terminated without further proceedings on the ground that REA has not sustained its burden."

Considering the basic deficiencies in the evidence submitted by REA, it is hard to see what else the Board could have done that was more favorable to REA. It could not decide the case on the record because of the deficiencies in the evidence submitted by REA. It could have dismissed the case on the grounds that the Board has no legal authority to fix past divisions.[25/] It could also have dismissed REA's claim on the ground that it had the burden

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25/ It has been the consistent position of the airlines that the Board has no jurisdiction to make retroactive adjustments of the divisions. It is their position that: (1) while the Board can prescribe divisions prospectively through its power to condition approval of REA-Airline agreements under Section 412 of the Act, it cannot alter the agreements themselves on a retroactive basis; and (2) the Board lacks the power to prescribe divisions of revenue between REA and the airlines pursuant to Section 1002(h) since express rates are not "joint rates" between REA and the airlines. Joint rates may exist only between connecting carriers operating through routes (i.e., airlines) and not between indirect air carriers and direct air carriers. It is their position that REA does not operate "through routes" in air transportation, but only pickup and delivery services which are terminal services rather than line-haul or through route services. Railway Express Agency, Inc., 2 C.A.B. 531, 540; Air Freight Forwarder Investigation, 24 C.A.B. 755 at 757; Airborne Freight Corporation v. Civil Aeronautics Board, 257 F.2d 210 (1958); Acme Fast Freight, Inc., Common Carrier Application, 17 M.C.C. 549 at 555).

of producing evidence within its competence and had failed to do so.[26/] Instead, the Board leaned over backwards to be fair to REA, and to give it every opportunity to present its legal and factual position.

B. THE BOARD ORDERS 74-2-118, 74-4-1, AND 74-5-74 ISSUED IN DISCUSSIONS CONCERNING INDUSTRY-WIDE PRIORITY AIR CARGO SERVICE ARE LEGALLY VALID

As previously pointed out, the Board's Opinion in Order 73-12-36, issued in the Express Service Investigation, stated (Jt.App.701a-702a) that the airlines have an obligation to provide highly expedited priority service for air cargo and invited the airlines to request authority from the Board to hold discussions among themselves looking toward the creation of an industry-wide priority air cargo service. The airlines accordingly filed a petition for such authority.

The reason for requesting such authority is rooted in the antitrust laws. If the airlines were to undertake discussions among themselves relating to such a highly competitive matter as the nature and scope of the expedited priority air cargo service

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26/ Pursuant to Section 7(c) of the Administrative Procedure Act, Section 506 of the Board's Regulations place the burden of going forward with the evidence on REA. The Board has consistently recognized that the opponent of a change in a rate has the burden of proof. Railway Express Increased Charges Case, 27 CAB 542 (1958); Air-Bus Tariffs Investigation, 39 CAB 142 at 147 (1963); Investigation - Eastern Air Coach Fare, 12 CAB 511 at 515 (1951); Alaska Air Mail Rates, 9 CAB 440 at 443 (1948); Minimum Charge Case, Order 72-4-107 (p. 28).

each is required to establish, without first obtaining authority from the Board to conduct such discussions, the airlines could be exposed to charges of antitrust violations if subsequently they individually were to institute operations incorporating concepts discussed at those meetings, even though no agreement had been reached at those meetings. If, however, such discussions are conducted under the sanction of the regulatory agency and in accordance with the conditions laid down by that agency relating to the manner of conducting such discussions, then the elements of a conspiracy under the antitrust laws would clearly be lacking.

REA was the only party who filed an opposition to the airlines' petition, even though a copy of the petition was served upon all parties who had participated in the Express Service Investigation case. REA in its reply moved that the petition be rejected by the Board, because it carried a new docket number, rather than the docket number of the Express Service Investigation case. REA contended that the matter was embraced within the scope of that proceeding. Actually, the assigning of a separate docket number to the Discussions case was the action of the Board itself, and not that of the airlines. The petition of the airlines carried no docket number at the time it was filed. The Board, and not the airlines, made the decision that these discussions involved a topic separate and distinct from the air express service being provided by the airlines and REA. REA also submitted a motion

requesting the Board to consolidate the matter with the Express Service Investigation case, in the event the Board did not reject the petition as erroneously filed.

The Board, in its Order 74-2-118, denied the motions of REA, stating (Jt. App. 746a):

> "The petition herein results from the decision of the Board in the Express Service Investigation, but there is no reason why it must or should be considered only in the context of that proceeding. The requested discussions will consider the formulation of a new type of service which the Board has found certificated scheduled air carriers under an obligation to provide. The Board can monitor the progress of the discussions sought herein while it considers REA's petitions for reconsideration and any other matters in the Express Service Investigation, without placing both in the same docket or consolidating them."

The Board, of course, has the discretionary authority to decide whether a particular matter submitted to it can most effectively be handled by the Board in a separate proceeding or by consolidation with an existing proceeding. (See discussions in Section III A.1 and III A.2(c) supra). In this instance the Board has certainly exercised its discretion properly. The airlines had asked only for authority to conduct discussions addressed to a future contingency - the discontinuance of air express service - and the creation of a new type priority air cargo service in such event. Thus, in effect, the airlines were asking for authority to discuss among themselves contingency plans in the event the present air express service, for

any reason, were to be terminated.[27/] They were not asking for the right to discontinue the present air express service, or even to discuss whether they should discontinue air express service, although REA appears to be arguing that such was the purpose of the intended discussions. Actually, the airlines already have full authority to discuss that subject under the terms of the underlying agreement among themselves relating to air express service (Agreement C.A.B. No. 12866, which Agreement has been approved by the Board and is also affected by Board Order 73-12-36). Thus, the Board's conclusion that the discussions were related to a matter separate and distinct from the issues in the Express Service Investigation was entirely sound.

In its Order 74-2-118 in this case, the Board granted the airlines authority to hold such discussions, subject to specific conditions, including the very significant condition that any agreement or agreements reached as a result of the authorized discussions shall be filed with the Board under section 412 of the Federal Aviation Act and shall not become effective unless and until approved by the Board (Jt. App. 749a). Thus, REA and any other interested party would have a full opportunity to present their views to the Board concerning any such agreement or

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27/ In the case of three airlines, Delta, North Central and Southern, the contingency has become a reality, because their withdrawal from air express service with REA has become effective. With respect to the other five airlines who have issued their individual notices of withdrawal, the contingency will have become reality for them also by the end of 1974. All of these airlines must conduct discussions in order to create the required priority air cargo services among themselves.

agreements in a section 412 proceeding, before any such agreement or agreements could become effective.

The airlines petitioned the Board to reconsider the condition in its Order 74-2-118, that shippers be permitted to attend the discussions among the airlines, because of the inhibiting effect that the presence of shippers would have upon the airlines in discussing the problems involving the traffic of particular types of shippers. In its Order 74-4-1, the Board amended its earlier Order by deleting the right of shippers to be present during the airline discussions among themselves, but the Board added other conditions which protected the interests of the shippers (see Section II C. supra). The Board, in its decision, carefully balanced the interests of the shippers against the desirability of full and frank discussions among the airlines and concluded that the equities lay in favor of the full discussions without the shippers being present, particularly since the Board had established elaborate safeguards for the shippers' interests.

REA opposed the airlines' petition for reconsideration on the ground that REA should be permitted to participate with the airlines in the discussions involving the establishment of the airlines' priority air cargo service. It argued that, as the airlines' partner for many years in air express service, it has a vital interest in participating in any successor service. This argument was, of course, wholly irrelevant and inappropriate. The new priority air cargo service was to be the individual service of

each airline, and the authorized discussions were to cover their mutual problems arising out of the necessity of interlining traffic originating on one airline and terminating on another. No partnership-type arrangement, such as exists in the present air express service, with REA responsible for the routing of traffic and for the pickup and delivery services, and with a sharing of the revenues between the airlines and REA, was contemplated. Thus, there was really no need or reason for REA to participate in these discussions among the airlines, and the Board so held.

REA also contended that it was an air carrier participating in air express service, and therefore it properly came within the scope of the Board's Order 74-2-118 authorizing the "air carriers presently participating in air express" to conduct the discussions, and that it therefore should not be excluded from the discussions. The Board acknowledged the fact that REA was an indirect air carrier, but rejected REA's contention that this fact warranted its participation in the discussions between direct air carriers (the airlines) relating to their development of procedures for interlining traffic among themselves. In footnote 3 to its Order 74-4-1,* the Board specifically disposed of this contention of REA, stating that it would clarify conditions of its original order specifically to exclude all indirect air carriers (REA and all airfreight forwarders) from the discussions, since they all would be shippers in their relationship to the airlines when using the airlines' priority air cargo services.

* Jt. App. 763a.

REA then filed with the Board a petition for reconsideration of its Order 74-4-1, which essentially reasserted the same arguments previously raised by REA in its pleadings in this case in response to the two previous petitions of the airlines. The Board in its Order 74-5-74 denied this petition for substantially the same reasons set forth in its two previous decisions in this case. (Jt. App. 813a).

Thus, REA had endeavored by sophistical argument to frustrate the airlines in their efforts to create contingency plans for an industry-wide priority air cargo service to be placed in operation if, as and when their air express service with REA is terminated; but the Board has not succumbed to REA's contentions. In issuing the Orders permitting the discussions and establishing the terms and conditions under which they shall be conducted, the Board has acted reasonably and within its statutory authority.

V. CONCLUSION

REA has failed to establish that the Board has abused the discretion vested in it under the statute to control its own proceedings or has violated either the Federal Aviation Act or the Administrative Procedure Act by denying the various requests of REA for consolidation; or by dividing the air express issues into two proceedings, one concerned with air express service matters and the other concerned with air express rates and the division thereof

between REA and the airlines; or by instructing REA and the airlines to endeavor to resolve the rates and division issued by agreement and stipulation; or by authorizing the airlines to discuss among themselves, with only government representatives present, the problems involved in establishing an industry-wide priority air cargo service in the event their participation in the present air express service with REA is terminated.

Wherefore, the Board's Orders 74-5-23 and 74-5-24 issued in the Express Rates Investigation case and the Board's Orders 74-2-118, 74-4-1, and 74-5-74 issued in the proceeding entitled Discussions Concerning Industry-Wide Priority Air Cargo Service are without reversible error and should be affirmed and the appeal dismissed as to those Orders.

Respectfully submitted,

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September 30, 1974

Honorable A. Daniel Fusaro
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U. S. Court House
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Re: REA Express, Inc. v. Civil Aeronautics Board
No. 74-1611

Dear Mr. Fusaro:

Under cover of a letter dated August 23, 1974, I filed four copies of the Brief for the airline intervenors in accordance with Rule 30(c), pending the printing of the Joint Appendix. On September 25 I was served with a copy of the Joint Appendix. In compliance with Rule 30(c) the citations in the brief have been revised by substituting citations to the Joint Appendix. Enclosed herewith are 25 copies of the revised brief.

I hereby certify that two copies of the revised brief of the airline intervenors have been served this 30th day of September 1974 upon each party to this proceeding by properly address first class mail.

Respectfully yours,

Russell S. Bernhard

Russell S. Bernhard

RSB/lls
Enclosures